United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-7163

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B
P/S

LEO M. SHORE,

Plaintiff-Appellant,

-against-

PARKLANE HOSIERY COMPANY, INC., HERBERT N. SOMEKH, DENISE D. SOMEKH, HERBERT N. SOMEKH, as Trustee of trusts for the benefit of his children, CHARLES B. YAFFE, BEULAH YAFFE, DAVID [illegible] DAVID, NEIL B. PERSKY, CARL APPEL, ESTHER APPEL, FLORENCE MUKAMEL, ARTHUR GOLD, STANLEY KUSCHNER and HAROLD STONE,

Defendants.

PARKLANE HOSIERY COMPANY, INC. and HERBERT N. SOMEKH,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

ANSWERING BRIEF FOR DEFENDANTS-APPELLEES

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UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

TABLE OF CONTENTS

	PAGE
Statement of the Case	3
POINT I -- The right to a trial by jury in this action is constitutionally protected; a claim of collateral estoppel cannot deprive Parklane and Somekh of that right on the basis of another action to which plaintiff was not a party and in which a right to a trial by jury did not exist	7
PCINT II -- Plaintiff's brief erroneously contends that regardless of the right to a jury trial, collateral estoppel applies in each and every case where the party against whom a plea of estoppel is asserted was either a party, or in privity with a party, to a prior action	11
POINT III -- Plaintiff's brief erroneously disregards the fact that the Seventh Amendment preserved the jury trial right against any enlargement of the principle of collateral estoppel	14
POINT IV -- Plaintiff's brief erroneously fails to recognize that the constitutional right to a jury trial is paramount to, and cannot be impaired by, collateral estoppel	20
POINT V -- Contrary to the erroneous contention in plaintiff's brief, Rachal was correctly decided and is dispositive of the issue here	27
POINT VI -- Plaintiff's brief misinterprets the authorities upon which it purports to rely in seeking to invoke collateral estoppel in derogation of the jury trial right	28

PAGE

POINT VII -- Apart from the requirements of the Seventh Amendment, defendants may not be deprived of their jury trial right by collateral estoppel 37

POINT VIII -- Plaintiff's brief erroneously contends that judicial economy would be served by depriving Parklane and Somekh of their right to a trial by jury 39

Conclusion 40

Addendum A
U.S. Const. amend. VII 42

TABLE OF AUTHORITIES

CASES

Allegheny Airlines, Inc. v. United States, 504 F.2d 104, 111 (7th Cir. 1974), cert. denied, 421 U.S. 978 (1975) 10

Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654 (1935) 14, 15, 19

Barr v. Gratz's Heirs, 17 U.S. 213 (1819) 13, 15

Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) 8, 9, 14, 21, 22, 23, 24, 25, 26, 27, 28, 31, 34

Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1912) 13, 15

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1972) 12, 13, 18, 39

Brady v. Daly, 175 U.S. 148 (1899) 15

Brooklyn City and Newtown R.R. Co. v. Nat'l Bank of the Republic of N.Y., 102 U.S. 14 (1880) 13, 15

	PAGE
Cannon v. Texas Gulf Sulphur Co., 323 Supp. 990 (S.D.N.Y. 1971)	10, 36, 37
Colgrove v. Battin, 413 U.S. 149, 155 (1973)	14
Crane Co. v. American Standard, Inc., 490 F.2d 332 (2d Cir. 1973)	16, 28, 29, 30, 31, 32, 33, 37
Curtis v. Loether, 415 U.S. 189 (1974)	8
Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962)	8, 14, 21, 22, 23, 24, 25, 26, 27, 28, 31, 34
Damsky v. Zavatt, 289 F.2d 46 (2d Cir. 1961)	14
Dimick v. Schiedt, 293 U.S. 474 (1935)	14, 15, 16, 18, 19, 20
Goldman, Sachs & Co. v. Edelstein, 494 F.2d 76 (2d Cir. 1974)	32, 33, 34, 37
Heyman v. Kline, 456 F.2d 123, 131 (2d Cir. 1972)	23
Lynne Carol Fashions, Inc. v. Cranston Print Works Co., 453 F.2d 1177, 1184 (3d Cir. 1972)	10
McCook v. Standard Oil Co., 393 F. Supp. 256 (C.D. Cal. 1975)	10, 38, 39
Meeker v. Ambassador Oil Corp., 375 U.S. 160 (1963), rev'g mem., 308 F.2d 875 (10th Cir. 1962)	8, 21, 24, 25, 26, 28, 29, 31, 34
Myzel v. Fields, 386 F.2d 718 (8th Cir. 1967) cert. denied, 390 U.S. 951 (1968)	22
Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970), cert. denied, 403 U.S. 904 (1971)	2, 7, 9, 10, 11, 14, 18, 20, 26, 27, 28, 29, 31, 33, 36, 37

PAGE

Ross v. Bernhard, 396 U.S. 531 (1970) 8

Schine v. Schine, [1969-70 Transfer Binder] CCH Fed. Sec. L. Rep. ¶92,552 (S.D.N.Y. 1970) 8, 9

Scott v. Neely, 140 U.S. 106 (1891) 23

SEC v. Standard Life Corp., 413 F. Supp. 84 (W.D. Okla. 1976) 10, 37

Simler v. Conner, 372 U.S. 221 (1963) 9

Stewart v. United Australian Oil, Inc., [1974-75 Transfer Binder] CCH Fed. Sec. L. Rep. ¶95,019 (S.D.N.Y. 1975) 10

In re TransOcean Tender Offer Securities Litigation, 427 F. Supp. 1211 (N.D. Ill. 1977) 32, 35, 36

United States v. United Airlines, Inc., 216 F. Supp. 709 (E.D. Wash. 1962), aff'd in part, modified in part, sub nom. United Airlines, Inc. v. Weiner, 335 F.2d 379 (9th Cir. 1964) 18

Whitman Elec. Inc. v. Local 363, Int. Bro. of Elec. W., 398 F. Supp. 1218 (S.D.N.Y. 1974) 32, 34, 35

UNITED STATES CONSTITUTION

U.S. Const. amend. VII 2, 3, 8, 11, 14, 16, 20, 24, 29, 31, 37

STATUTES

Securities Exchange Act of 1933:
§ 5, 15 U.S.C. 77(e) 9

§ 17(a), 15 U.S.C. 77q(a) 5

PAGE

Securities Exchange Act of 1934:
§ 10(b), 15 U.S.C. §78j(b) 3, 5, 9

§ 13(a), 15 U.S.C. §78m(a) 5

§ 14(a), 15 U.S.C. §78n(a) 3, 5

§ 20(a), 15 U.S.C. §78t(a) 3

RULES AND REGULATIONS

Rule 23(e), Fed. R. Civ. P. 40

Rule 5, Fed. R. App. P. 7

28 U.S.C. § 1292(b) 6, 7

ARTICLES AND TREATISES

5 Moore's Federal Practice (2d ed. 1976) 25

Shapiro and Coquillette, The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill, 85 Harv. L. Rev. 442 (1971) 2, 3, 16, 17, 18, 19, 20, 21, 22, 25, 26, 28, 29

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 77-7163

LEO M. SHORE,

Plaintiff-Appellant,

-against-

PARKLANE HOSIERY COMPANY, INC., HERBERT N. SOMEKH, DENISE D. SOMEKH, HERBERT N. SOMEKH, as Trustee of trusts for the benefit of his children, CHARLES B. YAFFE, BEULAH YAFFE, DAVID N. DAVID, NEIL B. PERSKY, CARL APPEL, ESTHER APPEL, FLORENCE MUKAMEL, ARTHUR GOLD, STANLEY KUSCHNER and HAROLD STONE,

Defendants.

PARKLANE HOSIERY COMPANY, INC.
and HERBERT N. SOMEKH,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

ANSWERING BRIEF FOR DEFENDANTS-APPELLEES

By this appeal, plaintiff erroneously seeks to deprive defendants-appellees -- two of the 14 named defendants -- of their constitutional right to the jury trial

of this action which plaintiff had himself demanded. To that end, plaintiff, without any authority and in the face of a substantial body of law to the contrary, mistakenly argues that collateral estoppel should be invoked on the basis of findings in a prior non-jury case (a) to which neither plaintiff nor 12 of the named defendants were party and (b) in which the right to a jury trial never existed.

In the Court below, plaintiff, as he does here, relied primarily upon a law review article and its ill-conceived premise that the constitutional right of trial by jury in civil cases is a "fetish"[1] -- an unfortunately shallow article which (a) misreads the Seventh Amendment to the United States Constitution and the United States Supreme Court's interpretation of it, (b) erroneously challenges the square holding of the Court of Appeals for the Fifth Circuit[2] that in the particular circumstances of this case collateral estoppel may not be invoked to deprive defendants of their jury trial right, and (c) mocks the fact that the Supreme Court denied review of that decision. Thus, the authors of the article gracelessly wrote:

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1. Shapiro and Coquillette, The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill, 85 Harv. L. Rev. 442 (1971).

2. Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970), cert. denied, 403 U.S. 904 (1971).

> "The Supreme Court, busy with more important matters and perhaps a bit fatigued with the subject of jury trials in civil cases, denied certiorari near the close of the 1970 term." 85 Harv. L. Rev. at 445.

As will hereinafter be seen, contrary to the mistaken conclusions of that law review article, the Supreme Court repeatedly has recognized that the constitutional right to a jury trial is inviolate -- not a fetish -- and has never suggested that, in circumstances such as exist here, the right to a jury trial can be eliminated by collateral estoppel. Rather, the Seventh Amendment and the Supreme Court's interpretation of it compel the conclusion that collateral estoppel cannot be invoked here to deprive defendants of their jury trial right.

Statement of the Case

Plaintiff, a former shareholder of defendant Parklane Hosiery Company, Inc. ("Parklane"), commenced this action on November 13, 1974 when he filed his complaint and simultaneously demanded a jury trial (A6).[3] The complaint was purportedly based upon alleged violations of §§ 10(b), 14(a) and 20(a) of the Securities Exchange Act of 1934 (the "1934 Act"),[4] certain rules thereunder and the common law.

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3. Reference to pages in the Joint Appendix will appear as follows: "(A)".

4. 15 U.S.C. §§ 78j(b), 78n(a), 78t(a).

The action followed an October 1974 merger, under the laws of the State of New York, whereby Parklane was returned to its former status as a private company. The complaint, seeking damages, challenged the validity of the merger and alleged that the proxy statement dated September 24, 1974 (the "Proxy Statement") -- the precursor to the merger -- was deficient in a number of respects (A13-14).[5] The answers to the complaint denied all of the material allegations of the complaint (A48, 56, 64).

After issue was joined, plaintiff moved for, and obtained, class action certification (A22). A notice of the pendency of the action which followed informed the class that "[t]he complaint seeks money damages for the members of the class" (A30).

The action then remained virtually dormant for approximately a year. Activity was resumed only after the Securities and Exchange Commission ("SEC"), on May 5, 1976, had commenced an action against Parklane and defendant Herbert N. Somekh, its president and a principal shareholder,

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5. The Proxy Statement had been issued in connection with an October 14, 1974 Parklane shareholders' meeting at which a merger between Parklane and New PLHC Corp. was effected. At the time of the merger, New PLHC Corp. was the owner of 71.6% of Parklane's common stock. As a result of the merger, (a) each share of Parklane common stock was cancelled, (b) each holder of Parklane common stock, other than New PLHC Corp., was entitled to receive $2.00 for each such share surrendered, and (c) each share of New PLHC Corp. common stock became one share of Parklane common stock (A18-19).

and simultaneously moved by order to show cause, seeking the same injunctive and ancillary relief sought in its complaint (the "SEC action") (A77-78).[6]

Unlike the complaint here, neither the SEC's complaint nor its motion challenged the validity of the Parklane merger (A81). Rather, the SEC's complaint was limited to a claim that the Proxy Statement was deficient in three respects (A80).

With the SEC's complaint in hand, plaintiff moved to amend his complaint. The principal purpose of the amendment was to enlarge plaintiff's original complaint by parroting the SEC's complaint. The motion was granted (A32). An amended complaint was served October 1, 1976 and repeated plaintiff's jury demand (A33). By then, the four-day hearing on the preliminary relief sought by the SEC in its action had been concluded, on June 7, 1976, and consolidated with a trial on the merits (A78).

Five months after the hearing, the District Court (Duffy, J.), on November 9, 1976, entered an Opinion and Order which found the Proxy Statement violated § 14(a) of the 1934 Act and Rule 14a-9 thereunder in the three respects

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6. The action was entitled SEC v. Parklane Hosiery Company, Inc. and Herbert N. Somekh, 76 Civ. 2024 (KTD). The SEC's complaint and motion were purportedly based upon § 17(a) of the Securities Act of 1933 (the "1933 Act"), 15 U.S.C. § 77q(a), §§ 10(b), 13(a) and 14(a) of the 1934 Act, 15 U.S.C. §§ 78j(b), 78m(a) and 78n(a), and certain rules promulgated thereunder (A77-78).

claimed by the SEC (A77-102). The District Court, however, denied all of the relief requested by the SEC except to the extent that Parklane was directed to amend its prior filings with the SEC to reflect, among other things, the three deficiencies found in the Proxy Statement (A99).[7]

Upon the basis of the Opinion and Order in the SEC action, plaintiff, on November 24, 1976, moved for summary judgment against Parklane and Somekh (A72). The motion's purported basis was that those two defendants were collaterally estopped in this action by the findings made in the SEC action. Parklane and Somekh, contending they were not so estopped, opposed plaintiff's motion on the grounds (a) that, in the SEC action, they had had no right to a jury trial; (b) that, in this action, they have a right to the jury trial which plaintiff himself had demanded; and (c) that Parklane and Somekh could not be deprived of their jury trial right in this action.

Plaintiff's motion was fully briefed, orally argued by both sides, and denied by the District Court (Wyatt, J.) (A103). Plaintiff then moved, pursuant to 28

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7. Judgment in the SEC action was not entered until March 9, 1977. Parklane and Somekh immediately appealed from the Judgment and the District Court's findings of fact and conclusions of law. The SEC cross-appealed only the denial of injunctive relief. Both appeals are presently pending and are sub judice in this Court (Docket No. 77-6012). This Court stayed the Judgment pending determination of the appeals.

U.S.C. § 1292(b) and Rule 5, Fed. R. App. P., for certification of a question for appeal. The District Court granted the motion (A112) and this Court, on April 5, 1977, granted plaintiff's petition for leave to appeal.

In denying summary judgment, the District Court relied upon Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970), cert. denied, 403 U.S. 904 (1971). There the question, also present here, was succinctly stated by the Court as follows:

> "The central question thus presented is whether a litigant can lose his constitutional right to a trial by jury by estoppel when the issue to be decided has been adjudicated adversely to him in a prior proceeding at which there was no right to a trial by jury and his present adversary was not a party." 435 F.2d at 63.

It is respectfully submitted that, as will hereinafter be seen, the Court of Appeals for the Fifth Circuit in Rachal correctly upheld the constitutional right of trial by jury against an attempted application of collateral estoppel in circumstances indistinguishable from those present here.

POINT I

> The right to a trial by jury in this action is constitutionally protected; a claim of collateral estoppel cannot deprive Parklane and Somekh of that right on the basis of another action to which plaintiff was not a party and in which a right to a trial by jury did not exist.

Plaintiff does not dispute defendants' right to a

trial by jury except insofar as he erroneously contends that collateral estoppel has taken that right away. To the contrary, it will hereinafter be seen (a) that, here, defendants' constitutionally protected right to a jury trial is unaffected by plaintiff's claim of collateral estoppel; (b) that Rachal, supra, faced with the identical question here presented, correctly upheld the right to a jury trial against an identical claim of collateral estoppel; (c) that all the relevant authorities demonstrate that Rachal was correctly decided; and (d) that plaintiff's attempt to escape Rachal rests upon a misunderstanding of (i) the right of trial by jury preserved by the Seventh Amendment and (ii) the law of collateral estoppel.

The Seventh Amendment, adopted in 1791, provided that "the right of trial by jury shall be preserved." It is undisputed that that right exists in a case, such as the case here, for damages under the federal securities laws. Schine v. Schine, [1969-70 Transfer Binder] CCH Fed. Sec. L. Rep. ¶92,552 (S.D.N.Y. 1970). And it cannot be disputed that the jury trial right exists even where, as here, both damages and equitable relief are sought. Curtis v. Loether, 415 U.S. 189 (1974); Ross v. Bernhard, 396 U.S. 531 (1970); Meeker v. Ambassador Oil Corp., 375 U.S. 160 (1963), rev'g mem. 308 F.2d 875 (10th Cir. 1962); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover,

359 U.S. 500 (1959); Schine v. Schine, supra.[8]

Nevertheless, plaintiff's brief erroneously contends that because certain issues were decided adversely to Parklane and Somekh in the SEC action, they lost their jury trial right as to those issues. The identical contention was flatly rejected in Rachal v. Hill, supra, a case which squarely presented the issue plaintiff raises.

Rachal and the case here are the same. In Rachal, a class and derivative action was brought against two corporate officers to recover damages resulting from alleged violations of § 5 of the 1933 Act and § 10(b) of the 1934 Act. In Rachal, as here, a jury trial had been demanded. In Rachal, as here, the issues and the claimed violations of the federal securities laws were the same as those in an earlier-decided SEC injunctive action. In Rachal, as here, the same defendants, but not the same plaintiffs, had been parties to an earlier-tried SEC action. In Rachal, as here, plaintiffs moved for summary judgment based upon findings adverse to the defendants made in the SEC injunctive action.

Rachal came to the Court of Appeals after plaintiffs'

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8. While plaintiff's brief (pp. 11-12) contends that state law principles of collateral estoppel may operate to deprive Parklane and Somekh of their right to a trial by jury of the pendent claims, that contention is plainly incorrect. The right to a jury trial in the federal courts is to be determined as a matter of federal law. Simler v. Conner, 372 U.S. 221 (1963). Therefore, for the same reasons that the federal securities laws claims here must be tried to a jury, the pendent claims must be tried to a jury.

motion for summary judgment had been granted. The district court had held that the defendants were collaterally estopped from trying the issues before it to a jury because of the adverse findings in the prior SEC action. Upon appeal, the Court of Appeals disagreed and reversed. 435 F.2d at 65.

Rachal held that the adverse findings in the prior SEC action could not collaterally estop defendants because there had been no right to a jury trial in that action and the Rachal plaintiffs had not been parties thereto. 435 F.2d at 64. For the same reasons, collateral estoppel may not be invoked by the plaintiff here to deprive defendants of their jury trial right. Accord, SEC v. Standard Life Corp., 413 F. Supp. 84 (W.D. Okla. 1976); McCook v. Standard Oil Co., 393 F. Supp. 256 (C.D. Cal. 1975); Cannon v. Texas Gulf Sulphur Co., 323 F. Supp. 990 (S.D.N.Y. 1971). See also Allegheny Airlines, Inc. v. United States, 504 F.2d 104, 111 (7th Cir. 1974), cert. denied, 421 U.S. 978 (1975); Lynne Carol Fashions, Inc. v. Cranston Print Works Co., 453 F.2d 1177, 1184 (3d Cir. 1972); Stewart v. United Australian Oil, Inc., [1974-75 Transfer Binder] CCH Fed. Sec. L. Rep. ¶95,019 (S.D.N.Y. 1975).

Thus, confronted here with facts indistinguishable from those in Rachal, plaintiff, in his brief, has assumed the untenable position of arguing that Rachal was incorrectly decided. As will hereinafter be seen, plaintiff's attempt

to escape Rachal rests upon several misconceptions. The first is the erroneous assumption that collateral estoppel automatically applies against a party in every case where an issue had been determined against him in a prior action. The second is the failure to recognize that, notwithstanding the adverse findings made in the earlier-tried SEC action, the Seventh Amendment has preserved inviolate the right of defendants to a jury trial here as the right existed when the Amendment was adopted. The third is plaintiff's patently erroneous contention that a constitutional right to trial by jury must bow to the principle of collateral estoppel.

We now turn to an examination of the pertinent principles which plaintiff's brief has misapprehended and its erroneous claim that Rachal was incorrectly decided.

POINT II

Plaintiff's brief erroneously contends that regardless of the right to a jury trial, collateral estoppel applies in each and every case where the party against whom a plea of estoppel is asserted was either a party, or in privity with a party, to a prior action.

Plaintiff's brief erroneously contends that for collateral estoppel to apply against a party, all that need appear is an adverse determination in a prior action to which it or its privy had been a party. Thus, plaintiff's brief (p. 11) states:

"It is simply necessary for the party against whom the plea of estoppel is asserted to have been a party to, or in privity with, a party in a prior case. Blonder-Tongue, 402 U.S. at 323-324."

No such contention can properly be made in this case. While, in support of his erroneous contention, plaintiff cites Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1972), that case is not only inapposite here, but actually contradicts plaintiff's contention.

In the first place, Blonder-Tongue, unlike the case here, did not involve a question as to the right of trial by jury or the application of collateral estoppel to extinguish that right. Rather, Blonder-Tongue concerned only the question of the validity of a patent and whether that question could subsequently be retried. On that issue, the Supreme Court held that a patentee whose patent had been held invalid in a prior infringement action was estopped from contending that it was valid in a subsequent infringement action against a different defendant.

Thus, it was in the manifestly limited context of that case that the Supreme Court in Blonder-Tongue was willing to indicate approval of the erosion of the mutuality requirement. 402 U.S. at 327, 350. That case had no occasion to consider, and did not even remotely suggest,

that collateral estoppel would apply where, as here, a jury trial right was involved. Nor did the Supreme Court rule, as plaintiff contends, that collateral estoppel applies in every case regardless of the presence or absence of mutuality.[9] To the contrary, in Blonder-Tongue, the Supreme Court ruled that, where mutuality is not present, (a) the application of collateral estoppel is not automatic, (b) each case must be examined on its own facts and (c) the application of collateral estoppel must depend upon considerations of "justice and equity". Thus, the Court wrote:

> "[A]s so often is the case, no one set of facts, no one collection of words or phrases, will provide an automatic formula for proper rulings on estoppel pleas. In the end, decision will necessarily rest on the trial courts' sense of justice and equity." 402 U.S. at 333-334.

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9. The limited and relatively recent relaxation of the mutuality requirement is briefly summarized in Blonder-Tongue, supra, 402 U.S. at 322-327. Previously, the common law had refused to apply collateral estoppel where mutuality was lacking. E.g., Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1912); Brooklyn City and Newtown R.R. Co. v. Nat'l Bank of the Republic of N.Y., 102 U.S. 14 (1880); see, e.g., Barr v. Gratz's Heirs, 17 U.S. 213 (1819). As defined in Blonder-Tongue, mutuality of estoppel means that "unless both parties (or their privies) in a second action are bound by a judgment in a previous case, neither party (nor his privy) in the second action may use the prior judgment as determinative of an issue in the second action." 402 U.S. at 320-321 (1971).

Here, such considerations need not be weighed. In light of the existence of defendants' constitutional right to a jury trial, collateral estoppel, as a matter of law, cannot apply here in any event.

POINT III

Plaintiff's brief erroneously disregards the fact that the Seventh Amendment preserved the jury trial right against any enlargement of the principle of collateral estoppel.

In challenging Rachal, supra, plaintiff's brief presents a distortion of the Seventh Amendment and the decisions of the Supreme Court which have held that the right of trial by jury as it existed in 1791 exists today and cannot be impaired. The Seventh Amendment and those decisions compelled the decision reached in Rachal. See Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654 (1935); Dimick v. Schiedt, 293 U.S. 474 (1935); Damsky v. Zavatt, 289 F.2d 46 (2d Cir. 1961). See also Colgrove v. Battin, 413 U.S. 149, 155 (1973); Dairy Queen, Inc. v. Wood, supra; Beacon Theatres, Inc. v. Westover, supra.

Thus, in Baltimore & Carolina, supra, the Supreme Court stated that the right of trial by jury preserved by the Seventh Amendment "is the right which existed under the English common law when the Amendment was adopted [in 1791]."

295 U.S. at 657. Accordingly, to determine whether a right to a jury trial exists here in the face of an attempted application of collateral estoppel, it is necessary to ascertain whether such an untrammeled right existed in 1791. If it did, then collateral estoppel cannot impair that right. In this regard, the Supreme Court in Dimick, supra, wrote:

> "In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791." 293 U.S. at 476.

The right of trial by jury in 1791, as it could or could not have been affected by the principle of collateral estoppel, was as follows: First, in 1791, collateral estoppel could only apply where there was mutuality. See Bigelow v. Old Dominion Copper Mining & Smelting Co., supra; Brooklyn City and Newtown R.R. Co. v. Nat'l Bank of the Republic of N.Y., supra; Barr v. Gratz's Heirs, supra. And where there was mutuality, the application of collateral estoppel could result in the loss of a jury trial right. E.g., Brady v. Daly, 175 U.S. 148 (1899). Second, in 1791, where there was no mutuality, collateral estoppel could not apply. Bigelow v. Old Dominion Copper Mining & Smelting Co., supra; Brooklyn City and Newtown R..R. Co. v. Nat'l Bank of the Republic of N.Y., supra; see Barr v. Gratz's Heirs, supra.

A fortiori, in such circumstance collateral estoppel could not affect the right of trial by jury.

Since, as the Supreme Court stated in Dimick, supra, the Seventh Amendment preserved the right of trial by jury as it existed at the time of its adoption in 1791, defendants here cannot be deprived of their jury trial right by reason of the SEC action. Plaintiff here was not a party to the SEC action and, therefore, could not in 1791 and cannot today invoke collateral estoppel to destroy that jury trial right. Thus, plaintiff has no basis for claiming that the right of trial by jury has been altered since 1791 and that defendants may be deprived of that right.

Lacking any such basis, plaintiff's brief attempts to alter the jury trial right preserved by the Seventh Amendment and the Supreme Court's interpretation of it. In so doing, as will be seen, plaintiff's brief (pp. 20-21) has mistakenly relied upon an erroneous argument made in a law review article by Messrs. Shapiro and Coquillette[10] and upon dicta in Crane Co. v. American Standard, Inc., 490 F.2d 332 (2d Cir. 1973)[11] in which that article is discussed.

In their article,[12] Shapiro and Coquillette begin their erroneous argument with the fact that in 1791, as

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10. See note 1, supra.

11. Crane is discussed at pp. 28-32, infra.

12. Shapiro and Coquillette, supra note 1, at 450-454.

long as there was mutuality, collateral estoppel could be invoked. Then, they say that where there was mutuality it was possible to invoke collateral estoppel whether it did or did not result in a loss of a right of trial by jury. Next say Shapiro and Coquillette, if collateral estoppel could have operated in cases where the right to jury trial may or may not have been involved, collateral estoppel is unrelated to the right to jury trial.

And, finally, Shapiro and Coquillette, committing egregious error, infer from such so-called "evidence", which they themselves admit is "essentially negative in character"[13] (emphasis added), that when the principle of collateral estoppel was broadened to apply in certain instances where mutuality was absent, collateral estoppel, as broadened, could be applied whether or not the right to a jury trial would thereby be impaired.

In so arguing, Shapiro and Coquillette not only (a) have abused the principle of collateral estoppel and the significance of its limited enlargement, but also (b) have improperly sought to destroy the inviolate nature of the jury trial right where mutuality does not exist. Their argument, at best, is superficial, and, at worst, is in

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13. Shapiro and Coquillette, supra note 1, at 454.

derogation of the Seventh Amendment and the Supreme Court's interpretation of it. Since collateral estoppel could not apply to impair the jury trial right as it existed in 1791 where mutuality did not exist, a subsequent broadening of collateral estoppel could not impair that jury trial right. As has been seen, that jury trial right today is the same jury trial right as it existed in 1791. Dimick v. Schiedt, supra, 293 U.S. at 476.[14]

All that can properly be said for the enlargement of the common law principle of collateral estoppel is that it became applicable only in certain cases where the question of loss of a jury trial right was not involved and mutuality did not exist. See, e.g., Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, supra.[15] There is nothing to support the impermissible jump Shapiro and Coquillette have tried to make in a futile attempt to

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14. Rachal upheld the jury trial right as it existed in 1791 and as it has continued to exist since then. Even the Shapiro and Coquillette article, supra note 1 at 454, admits that, on the Rachal facts, it would have been "impossible," in 1791, to deprive the Rachal defendants of their jury trial right. In the face of that admission, plaintiff's brief (p. 15) contains the absurd assertion that "the Rachal Court created a right to jury trial where none existed before."

15. Collateral estoppel could be applied as to a legal issue in the absence of mutuality only where, unlike the case here, the constitutional right to trial by jury has been satisfied by an opportunity to try that issue to a jury in a prior action. See, e.g., United States v. United Airlines, Inc., 216 F. Supp. 709, 729 (E.D. Wash. 1962), aff'd in part, modified in part on other grounds, sub nom. United Airlines, Inc. v. Weiner, 335 F.2d 379, 404 (9th Cir. 1964).

eliminate the right to jury trial where, as in the instant case, that right could not have been extinguished in 1791.

What Shapiro and Coquillette unfortunately failed to comprehend is that while common law principles, such as collateral estoppel, may change in scope, a constitutional right, such as the right to jury trial as it existed in 1791 and as it, therefore, exists today, may not be diminished. Baltimore & Carolina Line, Inc. v. Redman, supra; Dimick v. Schiedt, supra.

In Dimick, supra, the Supreme Court was squarely confronted with, and rejected, a Shapiro-Coquillette type of argument. In Dimick, which, among other authorities, Shapiro and Coquillette apparently overlooked, the Supreme Court made it crystal clear that a constitutionally preserved right to a jury trial could not be lost through a change in the common law. In this regard, the Dimick Court wrote:

> "It is said that the common law is susceptible of growth and adaptation to new circumstances and situations, and the courts have power to declare and effectuate what is the present rule in respect of a given subject without regard to the old rule; and some attempt is made to apply that principle here. The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions. Funk v. United States, 290 U.S. 371, 78 L. ed. 369, 54 S. Ct. 212, 93 A.L.R. 1136. But here we are dealing with a constitutional provision which has in effect adopted the rules of the common law in respect of trial by jury as these rules existed in 1791. To effectuate any change in these rules is not to deal with

the common law, qua common law, but to alter the Constitution." 293 U.S. at 487. (emphasis added)

In short, Shapiro and Coquillette have placed the common law cart before the constitutional horse. While the common law is mutable, the right provided by the Seventh Amendment is not. By its terms, the Seventh Amendment preserves the right of trial by jury as it existed in 1791 against impairment through subsequent changes in the common law, including changes in the principle of collateral estoppel.

Neither Shapiro and Coquillette nor plaintiff has cited a single decision in which it was held that the right to a jury determination of an issue has been lost where it had existed in 1791. It is respectfully submitted that Rachal, which upheld that right, was correctly decided.

POINT IV

Plaintiff's brief erroneously fails to recognize that the constitutional right to a jury trial is paramount to, and cannot be impaired by, collateral estoppel.

The erroneous thesis of the Shapiro and Coquillette article -- which plaintiff's brief has embraced -- is that Rachal, supra, was incorrectly decided because, as the article mistakenly contends, the constitutional right to a jury trial must bow to a change in the common law principle of collateral estoppel.

To support their upside-down analysis, Shapiro and Coquillette misread Beacon Theatres, supra, and Dairy Queen, supra. Those two cases, and Meeker, supra, which followed them and as to which Shapiro and Coquillette appear to have been totally unaware, serve to expose the fallacy of their contention.

In Beacon Theatres and Dairy Queen, the Supreme Court not only held that the historical right to trial by jury must be preserved inviolate, but also stated that it could not even anticipate circumstances so imperative that the right to a jury trial of legal issues could be lost through a prior determination of equitable claims. Thus, in Beacon Theatres, the Supreme Court wrote:

> "As this Court said in Scott v. Neely, 140 U.S. 106, 109, 110, 35 L.ed 358, 360, 11 S Ct. 712: 'In the Federal Courts this [jury] right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency.' This long-standing principle of equity dictates that only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." 359 U.S. at 510-11 (emphasis added; footnotes omitted) (quoted in part in Dairy Queen, supra, 369 U.S. at 471-473)

In Beacon Theatres, a single action presented both claims for equitable relief and a related counterclaim and cross-claim for legal relief. The trial court ordered that issues common to the equitable and legal claims were to be tried to the court. The defendant, who had demanded a trial by jury, then sought, by mandamus, to have that order vacated. While the Court of Appeals for the Ninth Circuit refused to grant the writ, the Supreme Court reversed and held that mandamus should issue to compel a jury trial of the common issues.

Essentially the same result obtained in Dairy Queen. There, the Supreme Court reaffirmed Beacon Theatres and held that where the plaintiffs themselves had asserted both legal and equitable claims, mandamus should issue to require common issues to be tried to a jury.[16]

While Shapiro and Coquillette have incorrectly used Beacon Theatres and Dairy Queen to support their discredited contention that the right to a jury trial as it

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16. Plaintiff's brief (pp. 14, 26) erroneously suggests that, if plaintiff had sought only rescission, there would have been no right to trial by jury and, accordingly, Parklane and Somekh should be estopped in respect of the claim for rescission. However, plaintiff seeks damages and, as the Supreme Court squarely held in Dairy Queen and Beacon Theatres, issues common to the legal and equitable claims must be tried to a jury. Moreover, plaintiff's claim for rescissional damages (A45) is also one as to which a right to trial by jury may obtain. See Myzel v. Fields, 386 F.2d 718, 741-742 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968). Finally, it is also noteworthy that the Court below here had certified the class, as the notice to the class shows, only as to an action for "money damages" (A30), and not for rescission or any equitable relief.

existed in 1791 may be diminished, those cases actually expanded the right to trial by jury. Prior to the procedural merger of law and equity, actions at law and suits in equity, even if related in subject matter and between the same parties, were required to be tried separately -- the former to a jury, if demanded, and the latter to a court. See Scott v. Neely, 140 U.S. 106 (1891). In holding that there was a right of trial by jury of equitable claims insofar as they presented issues common to legal claims, Beacon Theatres and Dairy Queen accorded a right to trial by jury where there had been none before.

The need for the expansion of the jury right in Beacon Theatres and Dairy Queen is readily apparent. When, through the procedural merger of law and equity, it became possible to assert both a legal and an equitable claim in the same action, the question arose whether the common issues should be tried to a jury or to the court alone. To have permitted separate and possibly inconsistent determinations by the court, as to the equitable claim, and by a jury, as to the legal claim, might have done unnecessary violence to the integrity of the judicial process and to principles of finality. See Heyman v. Kline, 456 F.2d 123, 131 (2d Cir. 1972). Thus, there were two possible alternatives, i.e., to try the common issues once to a jury, or once to the court. Beacon Theatres and Dairy Queen held

that the constitutional presence of the Seventh Amendment permitted only one of the alternatives -- trial by jury.

The Supreme Court thereby showed that the Seventh Amendment permitted the policy of according finality to a single determination of an issue to be served only by expanding rather than contracting the right to try that issue to a jury.

The inviolate right to trial by jury so clearly enunciated and preserved in Beacon Theatres and Dairy Queen is even more forcefully seen in Meeker, supra. In Meeker, plaintiffs asserted both a legal claim and an equitable claim which presented common issues. 308 F.2d at 878. The plaintiffs demanded a trial by jury on both claims, but the request was denied. 308 F.2d at 882. In contrast to Beacon Theatres and Dairy Queen, mandamus was not sought and the action proceeded to trial.

Over plaintiffs' objection, the district court tried the equitable claim and resolved the common issues against plaintiffs. Upon appeal, the Court of Appeals affirmed. It held that while the plaintiffs would have been entitled to a jury trial on any remaining issues which the legal claim might have presented, there was nothing left of that claim to try, since it was barred by the district court's determination of the common issues. 308 F.2d at

884. The Supreme Court, in reversing per curiam without opinion, cited Beacon Theatres and Dairy Queen. Meeker, supra, 375 U.S. at 160; 5 Moore's Federal Practice ¶38.11 [8.-6] at 128.13 (2d ed. 1976).

Meeker thus shows (a) that even where an issue, common to legal and equitable claims, has actually been determined by a court, the constitutional right to a jury trial must prevail over any policy of according finality to a prior adjudication and (b) that the right to a trial by jury cannot be lost merely because a party does not seek mandamus to enforce it, as had been the case in Beacon Theatres and Dairy Queen.

The Shapiro and Coquillette article,[17] contrary to Meeker, indefensibly assumes that if, in a case such as Beacon Theatres or Dairy Queen, mandamus had not been sought and the trial court actually proceeded to decide the issues common to the legal and equitable claims, its determination of those issues would stand and would be binding as to the legal claim. Mechanically following the erroneous lead of Shapiro and Coquillette, plaintiff's brief makes the following totally indefensible assertions:

> "The Supreme Court recognized that, if the equitable claim [in Beacon Theatres] were heard first, because of the doctrine of collateral estoppel, there would be no right to a jury on the legal claims." (p.18)

and

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17. Shapiro and Coquillette, supra note 1, at 446-447.

> "[T]he Supreme Court never meant to imply that a possible jury trial right limits the application of the doctrine of collateral estoppel." (p. 16)

This clearly appears to be a case of the blind leading the blind. Meeker, inexplicably ignored in the Shapiro and Coquillette article and plaintiff's brief, flatly rejects the contention which the article asserts and plaintiff's brief adopts.

Had Shapiro and Coquillette only been aware of Meeker they could not have (a) made their erroneous assumption, (b) criticized Rachal, supra, or (c) viewed the right of trial by jury in civil cases as a "fetish."[18] Nor, if Shapiro and Coquillette had read Meeker and correctly understood its forebears and cognate authorities, could they have indulged in their mistaken assertion that "Rachal takes exactly the opposite tack from Beacon Theatres".[19] To the contrary, Rachal faithfully adhered to the reasoning of Beacon Theatres and Dairy Queen. Rachal is also consistent with the teaching of Meeker which followed those decisions.

It is respectfully submitted that as between (a) the Court of Appeals for the Fifth Circuit and (b) Shapiro and Coquillette on the question decided in Rachal, the Court of Appeals was, as a matter of law, clearly right, and Shapiro and Coquillette along with plaintiff were, as a matter of law, clearly wrong.

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18. Id. at 442.

19. Id. at 447.

POINT V

Contrary to the erroneous contention in plaintiff's brief, Rachal was correctly decided and is dispositive of the issue here.

In Rachal, supra, the Court of Appeals was presented with the question whether the constitutional right to a jury trial was to be preserved or extinguished. The Court clearly and correctly understood and applied the Supreme Court's teaching in Beacon Theatres, supra, and Dairy Queen, supra. As a result, the Court in Rachal correctly held that the jury trial right must prevail and collateral estoppel could not be applied to impair it. Thus, the Court wrote:

> "In light of the great respect afforded in [Beacon Theatres, Inc. v. Westover, supra], and its progeny, for a litigant's right to have legal claims tried first before a jury in an action where legal and equitable claims are joined, it would be anomalous to hold that the appellants have lost their right to a trial by jury on the issue of whether they are liable to respond in damages for violations of the security laws because of a prior adverse determination by the district court of the same issue in an action in which their present adversary was not a party and which arose in a different context from the present action. Beacon Theatres, supra, makes it clear that had Hill been a party plaintiff in the S.E.C. injunction action and there presented his claim for damages, the appellants would have received a jury trial on the issue of liability. It hardly makes sense that Hill

> can now assume a position superior to that to which he would have been entitled if he had been a party to the prior action. Accordingly, we hold that the application of the doctrine of collateral estoppel was not appropriate in view of the particular circumstances presented by this case and that the district court erred in granting summary judgment on the issue of liability." 435 F.2d at 64. (emphasis added)

The reasoning of the Supreme Court in Beacon Theatres, which was reaffirmed in Dairy Queen and by Meeker, compelled the conclusion reached by the Court in Rachal. It is respectfully submitted that the result reached in Rachal is the result which should also be reached here.

POINT VI

> Plaintiff's brief misinterprets the authorities upon which it purports to rely in seeking to invoke collateral estoppel in derogation of the jury trial right.

Plaintiff's brief (pp. 19-21) not only adopts the erroneous reasoning and conclusions of Shapiro and Coquillette,[20] but, compounding its error, mistakenly urges that this Court's decision in Crane Co. v. American Standard, Inc., supra, lends support to plaintiff's contention that Parklane and Somekh may be deprived of their right to trial by jury in this action. As will be seen, however, Crane involved

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20. See note 1, supra.

facts clearly different from those here and, on those facts, reached a result consistent with the historical right to trial by jury preserved by the Seventh Amendment.

While plaintiff seeks to draw comfort from dicta in a footnote in Crane in which the Court commented that it was "not at all sure that Rachal was correctly decided," 490 F.2d at 343 n.15, the Court, in Crane, did not have before it, and never reached the question presented in Rachal, supra. Moreover, the doubt was drawn from the Shapiro and Coquillette article which, as has been seen, is deficient in fundamental respects, not the least of which is the inexplicable failure to have taken Meeker into account. The fact that the Shapiro and Coquillette article did not make mention of Meeker would suggest that when the Crane footnote was written the Court had not been apprised of Meeker.

In Crane, supra, plaintiff Crane, asserting equitable claims and seeking only equitable relief, brought an action seeking, among other things, to enjoin a merger. The action was tried to the court without a jury. The court rendered judgment for defendant Standard. Thereafter, Standard consummated the merger. 490 F.2d at 335.

Subsequently, this Court reversed the trial court in part, holding that the trial record established that Crane had been entitled to judgment on one of the violations it claimed. 490 F.2d at 336. Upon appeal, it appeared that

the post-judgment consummation of the merger had, for the first time, caused Crane injury for which money damages might be recoverable. 490 F.2d at 336-337. Accordingly, this Court remanded Crane for consideration of damages or other relief. Seizing upon the principle that claims for money damages are ordinarily legal claims entitled to be tried to a jury, Standard then contended that if money damages were to be awarded, it had a right to retry the merits of the action to a jury.

In the interim, Standard had commenced its own related action against Crane. Crane, now a defendant, interposed the same claim which it had asserted in the first action, as a counterclaim for money damages. Standard contended that it was entitled to a jury trial in the second action and that, accordingly, the judgment adverse to it in the first action could not preclude it from litigating the merits of Crane's counterclaim in the second action. 490 F.2d at 339.

This Court rejected both of Standard's contentions. It held that Standard could not retry the first action to a jury and that, under established principles of finality, it was precluded from relitigating Crane's claim in the second action, in which it had been asserted as a counterclaim. 490 F.2d at 343.

That decision was consistent with the historical scope of the jury trial right and lends no support to plaintiff's contention here. Crane did not, and the Seventh Amendment does not, confer a right to retrial by jury between the same parties where wholly equitable claims properly had been tried to a court and a possibility of money damages arose only because of defendant's acts which occurred subsequent to the district court's erroneous judgment in the first case. 490 F.2d at 340-342. Thus, this Court did not diminish or deny the right to a trial by jury. Rather, it merely refused to expand that right where, unlike the case here, the result would have been to retry the same claim between the same parties where the first trial had properly been to the court alone.

As has been seen, Beacon Theatres, supra, Dairy Queen, supra, and Meeker, supra, teach that the historical bounds of the constitutional right to trial by jury may not be diminished, but may only be expanded. Nothing in the holding of Crane suggests that any exception to that teaching may be made to diminish defendants' jury trial right here.

In short, as Crane itself states, Rachal is distinguishable from Crane "since [Rachal] dealt with two separate proceedings with different plaintiffs." 490 F.2d at 343 n.15. That is a distinction between Crane and this

case which is controlling here. It is a distinction which separates cases in which collateral estoppel may affect the jury trial right from cases in which it cannot affect the jury trial right.

Just as plaintiff's brief mistakenly relied upon Crane, so has plaintiff's brief (pp. 15, 21-25) mistakenly relied upon the following cases, none of which provide plaintiff with any support: Goldman, Sachs & Co. v. Edelstein, 494 F.2d 76 (2d Cir. 1974); In re TransOcean Tender Offer Securities Litigation, 427 F. Supp. 1211 (N.D. Ill. 1977); Whitman Elec. Inc. v. Local 363, Int. Bro. of Elec. W., 398 F. Supp. 1218 (S.D.N.Y. 1974).

In Goldman, Sachs, supra, the question presented concerned the order of trial of a number of related cases. This Court issued a writ of mandamus which required the district court to try Welch, one of the several related cases which was to be tried to a jury, before Franklin, another of those cases. The district court had ordered Franklin, in which the right to trial by jury had been waived, 494 F.2d at 79 (dissenting opinion), to be tried first.

In issuing the writ, this Court noted (a) that, throughout the period of consolidated pre-trial discovery, the parties and the district court had made it abundantly clear that Welch was to be tried first, 494 F.2d at 77, and

stated (b) that "no rational basis has been shown for not adhering to the anticipated order of trials or at least permitting the jury trial of the Welch case to proceed simultaneously with the non-jury trial of Franklin ..." 494 F.2d at 78.

This Court was apparently concerned with the possibility that trial of an issue by the district court in Franklin might subsequently be claimed to operate as an estoppel in Welch. Thus, in granting the writ, this Court, in Goldman, Sachs, upheld the right to trial by jury and did not permit even the risk of an unwitting waiver or loss of that right.

The Court's concern in Goldman, Sachs has no application to the facts here or in Rachal, supra. Whereas in Franklin the jury right had been waived, here and in Rachal there had been no right of trial by jury in the prior SEC actions -- a distinction which renders meaningless the reliance of plaintiff's brief (pp. 21-23) upon Goldman, Sachs.

Moreover, in his dissenting opinion, Judge Oakes noted the absence of any authority for the majority's speculation that collateral estoppel might apply in the circumstances presented there. Judge Oakes, addressing the dicta in the footnote in Crane, supra, relied upon in plaintiff's brief (p. 16), wrote:

> "No court has ever held, nor in my view will ever hold, that on the facts presented here petitioner would be foreclosed from litigating the facts before the jury in Welch. The only basis for petitioner's fear is dictum in a footnote, totally unnecessary to the decision, in Crane Co. v. American Standard, Inc., 490 F.2d 332 (2d Cir. 1973), p. 343 n.15." 494 F.2d at 79.

The decision in Goldman, Sachs clearly shows that this Court was not there deciding whether the right to a jury trial in Welch would have been lost if Franklin were tried first. Nevertheless, plaintiff's brief (pp. 22-23) erroneously assumes that that was the implicit basis for the decision. Plaintiff's mistaken assumption is that there could have been no reason to issue mandamus unless the right to trial by jury in Welch was about to be irrevocably lost. That assumption is totally erroneous. With or without mandamus having issued in Goldman, Sachs, the right to a jury trial in Welch was not endangered and would not have been lost. Compare Dairy Queen, Inc. v. Wood, supra, and Beacon Theatres Inc. v. Westover, supra, with Meeker v. Ambassador Oil Corp., supra.[21]

The reliance of plaintiff's brief (p. 24) upon Whitman, supra, is no less misplaced than its reliance upon Goldman, Sachs. In Whitman, the same parties had participated in a prior proceeding before the National Labor

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21. See discussion of those authorities at pp. 20-26, supra.

Relations Board in which the same issues subsequently raised in Whitman had been determined. The district court held that collateral estoppel applied. Whitman, an action where there was mutuality of estoppel is an action in which collateral estoppel could have been applied in 1791 (see p. 15, supra). Thus, the result in Whitman is consistent with the Seventh Amendment, but is clearly distinguishable from, and has no bearing upon, the case here.

Plaintiff's brief (pp. 24-25) also mistakenly relies upon TransOcean, supra. There, the plaintiffs asserted both state and federal claims of improper disclosure in connection with a tender offer. Certain of the plaintiffs had previously brought their state law claims in a Delaware proceeding against the same parties or their privies. 427 F. Supp. at 1215 n.5, 1217. In the Delaware proceeding there had been no right to a trial by jury.

After the Delaware proceeding had been tried to the court, the state law claims were dismissed upon a finding that the disclosure had been adequate. The Delaware plaintiffs, nevertheless, contended in TransOcean (a) that they were entitled to relitigate the state law claims in federal court and (b) that they were not collaterally estopped in respect of their federal claims because they had a right in federal court to a jury trial on the issue of adequate

disclosure. These contentions were rejected.

The TransOcean court recognized the distinction between the case before it and Rachal, supra, as a case in which mutuality of estoppel was not present. 427 F. Supp. at 1217. This distinction is of obvious importance to Rachal and the case here, but is not even mentioned in plaintiff's brief.

In passing, it should also be noted that the plaintiffs in TransOcean could hardly complain that they had been denied a jury trial on the issue of disclosure. They had themselves chosen first to litigate that issue in a forum in which they had no right to a jury trial.

In sum, the authorities show that, on the facts here and in Rachal, a party cannot be deprived of a right to a trial by jury on the basis of a prior determination where there was no such right. Plaintiff's brief fails to cite a single case holding the contrary.

Nor does Rachal stand alone. Other cases have followed it, none of which are mentioned in plaintiff's brief.

In Cannon v. Texas Gulf Sulphur Co., supra, a class action, plaintiffs had moved for partial summary judgment upon the ground that certain of the defendants

therein were collaterally estopped from denying conduct violative of the federal securities laws on the ground, inter alia, that the issues had been determined in a prior action brought by the SEC against those defendants. The district court refused to grant summary judgment. It upheld the defendants' right to trial by jury in the private class action. It held, as the Court below here had held, that "in the light of Rachal, defendants are not collaterally estopped by the findings in the SEC action." 323 F. Supp. at 994.

The holding of Rachal, supra, was again followed in SEC v. Standard Life Corp., supra. There, the Court, in striking a defendant's jury demand in an action brought by the SEC, followed Rachal. As in Rachal, the Court in Standard Life stated that the defendant would receive a complete jury trial on all issues in a companion private civil action. It is respectfully noted that, after considering the footnote comments of this Court in Crane and those of Judge Oakes in Goldman, Sachs, supra, the Court, in Standard Life, wrote that the holding of Rachal "is sound and would apply in the instant case." 413 F. Supp. at 87.

POINT VII

Apart from the requirements of the Seventh Amendment, defendants may not be deprived of their jury trial right by collateral estoppel.

Even apart from the mandate of the Seventh Amendment,

it is clear that defendants cannot be deprived of their jury trial right by collateral estoppel. McCook v. Standard Oil Co., supra. In McCook, the Court, noting the absence of mutuality in that case, held that a defendant could not be collaterally estopped in a private civil action in which a right to trial by jury existed on the basis of a prior government antitrust action in which defendant had no such right.

There, though the Court recognized that the mutuality requirement had been relaxed in certain instances, it did not even find it necessary to reach the question whether the preservation of the jury trial right was constitutionally required in McCook. 393 F. Supp. at 259. Rather, the Court balanced the policy favoring an end to litigation against preservation of the strong policy favoring the right to trial by jury and concluded that where, as here, a court is called upon, in the absence of mutuality, to apply collateral estoppel offensively, i.e., to impose liability, a party should not be estopped where it had no right to trial by jury in the first action.

As the Court in McCook, supra, wrote:

> "Since these cases clearly show that collateral estoppel is not always applied offensively in the absence of mutuality, it would seem appropriate for this court to refuse to apply the doctrine when (1) the defendant had no right to a jury trial in the first action and (2) the plaintiff was not a party to

> the prior action in equity, but now seeks to use the earlier equitable decree as a sword against the defendant in an action at law. By carving this small exception into the offensive use of collateral estoppel, the court slightly compromises the policy favoring an end to litigation and preserves the strong policy favoring jury trial. 393 F. Supp. at 258. (emphasis added)

POINT VIII

> Plaintiff's brief erroneously contends that judicial economy would be served by depriving Parklane and Somekh of their right to a trial by jury.

For the sake of completeness, only one further point remains to be mentioned. Plaintiff's brief (pp. 25-27) argues that judicial economy would be served by denying Parklane and Somekh their right of a trial by jury. The argument has no basis in fact.

Parklane and Somekh are only two of the 14 named defendants in this action. As to the other defendants, none of whom were party to the SEC action, there can clearly be no estoppel on the basis of that action, see Blonder-Tongue, supra, 402 U.S. at 329, and those defendants are entitled to a trial by jury. This is to say nothing of the fact that Parklane and Somekh also are entitled to a jury trial on the

question of the causation and amount of damages, if any. Plaintiff does not even dispute these facts. Thus, a jury trial can in no way be avoided in this action.

Indeed, the anomalous and unwarranted result which plaintiff urges here is that Parklane and Somekh should be denied the right to defend the claims asserted against them before the same jury which will try the claims against the other defendants in this action.[22] Plaintiff's suggestion of the possibility of judicial economy is, at the very least, without force.

Conclusion

It is respectfully submitted that Parklane and Somekh have a constitutionally protected right to a jury trial in this action and that that right cannot be extinguished by a claim of collateral estoppel.

For the foregoing reasons, it is respectfully submitted further, (a) that the Court below properly denied

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22. Since this action has been certified as a class action (A29), it could not be dismissed by plaintiff against any defendant without approval of the Court. Rule 23(e), Fed. R. Civ. P. Here, no request for such dismissal has been made and there is nowhere even a suggestion that such approval would be given.

plaintiff's motion for summary judgment based upon an estoppel plea and (b) that the question certified should be answered in the negative.

Respectfully submitted,

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Addendum A

U.S. Const. amend. VII

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JAMES YOUNG, being duly sworn, deposes and says:

That he is not a party to the action, is over 18 years of age, and resides at 3150 Rochambau Avenue, Bronx, New York; and that on the 22nd day of June, 1977, deponent served two copies of the annexed Brief upon

Kass, Goodkind, Wechsler & Gerstein
Attorneys for Plaintiff-Appellant
-at-
122 East 42nd Street
New York, New York 10017

the address designated for that purpose, by leaving same with the receptionist at their offices.

James Young
JAMES YOUNG

Sworn to before me this
22nd day of June, 1977

Joseph N. Salomon
Notary Public

JOSEPH N. SALOMON
Notary Public, State of New York
No. 31-4526755
Qualified in New York County
Commission Expires March 30, 1978

COPY RECEIVED
22 DAY OF June